Supreme Court, U.S.
FILED
FEB 20 1996
CLERK

No. 95-978

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

PHIL CARUSO, as President of the Patrolmen's Benevolent Association of the City of New York, Inc., and New York City Police Officers Michael Bonenfant, NYPD Officer; Paul Chiaramonte, NYC Police Officer; Michael Miller, NYC Police Officer; Kevin Murphy, NYC Police Officer; Paul Polito, NYC Police Officer; Paul Sanzone, NYC Police Officer; Thomas Sheehan, NYC Police Officer; David Turnof, NYC Police Officer; M. Wnorowski, NYC Police Officer,

Petitioners,

- against -

RAYMOND W. KELLY, as Police Commissioner of the Police Department of the City of New York and the POLICE DEPARTMENT OF THE CITY OF NEW YORK,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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COUNTER QUESTIONS PRESENTED

1. Are petitioners precluded from raising constitutional claims in a federal court action, where the identical claims were previously raised and resolved in favor of respondents in a quasi-judicial administrative disciplinary proceeding, followed by a determination by an intermediate state appellate court determination, and finally by an order of New York State's highest tribunal, which denied their application for leave to appeal?

2. Even if petitioners are not precluded from raising their constitutional claims in federal court, should the writ nevertheless be denied on the ground that the disciplinary penalties imposed did not implicate their First and Fourteenth Amendment rights to speak on matters of public concern?

LIST OF PARTIES

All parties are listed in the caption of the petition for a writ of certiorari.

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POINT I

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STATEMENT OF THE CASE

The Demonstration

On September 16, 1992, approximately 15,000 off-duty police officers and other interested persons participated in a rally staged by the Patrolmen's Benevolent Association ("PBA"), in the vicinity of New York City's City Hall, under a permit issued by the City authorizing a rally to march around the perimeter of City Hall Park, to be followed by a gathering, for speeches, on a street adjacent to City Hall Park i.e., Murray Street (45, 46, 66, 74, 154).[1] The stated purpose of the rally was to protest pending local legislation intended to change the composition of the Civilian Complaint Review Board ("CCRB"),[2] as well as to protest alleged

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[1] All numbers in parentheses refer to pages in the Joint Appendix filed in conjunction with petitioners' appeal to the United States Court of Appeals for the Second Circuit.

All numbers in parentheses preceded by the letter "A" refer to pages in the Appendix annexed to petitioners' petition for a Writ of Certiorari.

All numbers in parentheses preceded by the letters "AA" refer to pages in the Appendix annexed hereto as part of respondents' opposition to the petition for a Writ of Certiorari.

[2] Pursuant to § 440 of the New York City Charter, prior to its 1993 amendment, the CCRB was composed of twelve members, six appointed by the Police Commissioner and six

(continued...)

political actions and statements by then-Mayor David Dinkins concerning the New York City Police Department ("NYPD") (45, 46, 66, 154).

Based upon the PBA's original estimate of 4-5000 expected demonstrators, the NYPD assigned 300 uniformed officers to monitor the demonstration and to confine the demonstrators to the sidewalk area around the perimeter of City Hall Park or, if that was not possible, to move the police barriers, where needed, into appropriately designated street lanes (71-72). When the numbers of demonstrators vastly exceeded the PBA's predicted estimation, the NYPD called in additional uniformed officers to monitor the rally and, in fact, expanded the barrier lines into the streets surrounding City Hall (72-75).

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[2] (...continued)
appointed by the Mayor, including one member from each of the City's five boroughs and one citywide representative. Section 440(c) of the Charter authorized the CCRB to receive, investigate, hear, and recommend action upon civilian complaints against members of the Police Department.

The proposed changes, which were opposed by the PBA and were ultimately adopted in 1993, involved, inter alia, increasing the number of members to thirteen; requiring that five members be designated by the City Council; three members with law enforcement experience be designated by the Police Commissioner; and five members be designated by the Mayor. Most importantly, the reconstituted CCRB would be a body independent of the Police Department, and its composition would have to reflect the diversity of the City's population. See, New York City Charter § 440(a)(b)(1),(2).

Not only did the numbers of demonstrators triple, thereby changing the mechanics of how the demonstration would have to be monitored by on-duty police officers, but also the actual demonstration itself did not go as planned. Instead of proceeding from the march around City Hall Park to Murray Street for speeches, the crowd split into two groups. One group followed then-PBA President Phil Caruso to Murray Street, and the second group went, unplanned, into City Hall Plaza (75).

Following a series of events whereby several people in the second group crossed police lines and took over the steps and plaza in front of City Hall (72), shouts and chants went up from that crowd to "Take the bridge!", meaning the Brooklyn Bridge ("Bridge") (67, 69, 80-81, 83, 88, 91). Accordingly, hundreds of the demonstrators, including off-duty police officers, left the steps and plaza in front of City Hall, and proceeded onto the ramp and/or the roadway of the Bridge (46, 66, 80-92). Following the demonstration, the NYPD's Internal Affairs Division investigated the actions of those off-duty police officers who had participated in the unauthorized activity of "taking the Bridge" (66, 155).

As a result of that investigation, 53 police officers were served with Administrative Charges and Specifications ("Charges") arising out of their conduct on September 16, 1992 (66). Each of the 53 officers was charged with having violated the general NYPD Patrol Guide provision § 104-1, i.e., "conduct unbecoming" a police officer, and, more specifically, each one was charged with having: (i) wrongfully entered the roadway of the Bridge, thereby obstructing the vehicular traffic thereon; and (ii) having wrongfully been present in the vehicular roadway in the vicinity of the Bridge (46, 47, 51-64, 92, 155).

The NYPD Administrative Disciplinary Proceeding

Pursuant to New York Civil Service Law § 75, the NYPD's trial division conducted a full disciplinary hearing with respect to the 53 charged officers on May 17, 18, 19 and 26, 1993 (47, 60-104, 155). During the hearing, the officers were represented by counsel; each one entered a plea of not guilty; and all counsel had the opportunity to call witnesses, present evidence and cross-examine the NYPD's witnesses. The Record unambiguously demonstrates that in their defense against the Charges, the nine petitioners herein not only testified, but also called two PBA delegates and an Assistant NYPD Chief to testify on their behalf (48, 71-92).[3]

During the administrative hearing, the NYPD presented testimonial and photographic evidence that there had been shouts to "Take the Bridge" from individuals at City Hall Park; that a number of the demonstrators had proceeded to the entrance ramp of the Bridge; that hundreds of demonstrators were on the Bridge's roadway; and that

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[3] The original caption of the complaint named, as plaintiffs, the 53 police officers who had been served with Charges, as well as Phil Caruso, in his capacity as President of the PBA. Subsequently, on or about November 10, 1994, a Stipulation and Order of voluntary dismissal was entered in the Southern District of New York for all of the originally named officer-plaintiffs except the nine officer-petitioners in the caption herein. Accordingly, only the above-captioned petitioner-officers, as well as PBA president Caruso, challenged the administrative finding of guilt and penalty imposed by the NYPD in the appeal, on constitutional grounds, to the Second Circuit, and now in the instant writ.

vehicular traffic bound for Manhattan was stopped and/or blocked as a result of the numbers of people on the Bridge's roadway or the ramp leading thereto (67-71).

The evidence presented on behalf of petitioners included testimony by NYPD Assistant Chief Reuther, who stated, inter alia, that: (i) the NYPD had added uniformed officers and had extended the barrier lines in an effort to accommodate and properly monitor the unanticipated number of demonstrators; and (ii) the PBA leadership had tried to lead the crowd from City Hall Park to the Murray Street location, but many of the demonstrators instead went first to the Bridge where they blocked traffic (71-72). Assistant Chief Reuther further testified that while it was not unusual during rallies and demonstrations for individuals to leave the area of containment set aside and agreed upon, those individuals would frequently be arrested, unless tactical considerations overruled that general policy (73).

Both of the PBA delegate-officers who testified on behalf of petitioners admitted that it was not part of the PBA's lawfully planned demonstration to be present or to stop traffic on the Bridge or the roadway leading thereto (77-79, 81). Indeed, both men testified that they themselves went to the Bridge specifically for the purpose of redirecting the crowd to the lawful demonstration over on Murray Street (77-79, 80-81).

During the administrative hearing, each of the nine petitioners admitted that they had gone voluntarily onto either the Bridge's roadway or its ramp (82-91). Moreover, several of them admitted that, because of the presence of so many people on the Bridge's roadway and ramp, no vehicular traffic could get through (83, 84, 87-88), and others admitted that

such conduct was either improper, or not part of the lawfully planned demonstration (82, 84, 85, 87).

After reviewing all of the testimony and evidence from the administrative hearing, the Deputy Commissioner of Trials ("the hearing officer") recommended to the Police Commissioner that each of these nine petitioners be found guilty of only one of the preferred Charges, i.e., having wrongfully been present on the vehicular roadway or ramp of the Bridge, on the grounds that such action was not part of the officially approved demonstration; that the action was a clear violation of traffic regulations; and that the action had resulted in the blocking of traffic (93-95). After having reviewed each of the officers' individual service records, the hearing officer recommended that, as a penalty, each be required to forfeit ten days of vacation (which is equivalent to approximately $1000 in salary), in recognition that, by engaging in such conduct, each petitioner had broken the law (101-103).

In reaching her recommendation, the hearing officer considered and then explicitly rejected petitioners' constitutional claims that the Charges were: (i) a pretext for violating their First Amendment rights to assemble and speak on a matter of public concern; and/or (ii) a violation of their alleged Equal Protection right to demonstrate and occupy the Bridge, while off-duty, without being held to a different standard of conduct from either the general public or other civil service employees (95-100).

On or about August 8, 1993, the Police Commissioner approved the hearing officer's Report and Recommendation, both as to the findings of guilt and the penalties to be imposed (50).

The Federal and State Court Procedural Histories

By order to show cause and verified complaint dated May 13, 1993, the 53 police officers who had been charged with violating NYPD Patrol Guide § 104-1, commenced an action in the United States District Court for the Southern District of New York ("District Court") alleging, inter alia, that the Charges were vindictive in nature as a matter of law, and that they violated petitioners' First and Fourteenth Amendment rights to assemble and speak out against political policies and decisions by the Mayor, which allegedly impacted on the duties of police officers (11-20).

Respondents interposed an answer in June 1993, denying the material allegations of the complaint, and raising four affirmative defenses, including the defense that the District Court should abstain from deciding the case, because there was an administrative disciplinary proceeding concerning the very same Charges already pending within the NYPD (32-36). As noted above, that proceeding resulted in findings of guilt and imposition of disciplinary penalties.

By motion dated January 18, 1994, respondents moved for summary judgment against the nine petitioners herein, on the ground that the District Court was required to give preclusive effect to the findings resulting from the NYPD's quasi-judicial administrative hearing procedures, in which each petitioner had been found guilty of one of the Charges (42-50).

By motion dated February 8, 1994, petitioners submitted an opposing statement of facts pursuant to Local Rule 3(g), and opposed respondents' application, arguing that the Court should not give preclusive effect to the NYPD's

administrative determination because the hearing officer had allegedly given only cursory consideration to petitioners' First Amendment claims (105-115).

OPINIONS BELOW

By opinion and order entered July 14, 1994, the District Court (Leisure, USDJ) granted respondents' motion for summary judgment and dismissed all of petitioners' claims (152-162). The District Court specifically held that the NYPD's administrative hearing process met both the Federal and State requirements for applying the doctrine of issue preclusion to petitioners' constitutional claims; accordingly, it dismissed all claims on that ground (156-157).

Despite having found issue preclusion controlling, the District Court nevertheless stated that there was nothing in the Record to indicate that the hearing officer had ever considered whether the NYPD's decision to discipline was a pretext for retaliating against petitioners for having exercised their First Amendment rights (158). Accordingly, the District Court went on to consider, and then to reject, this claim (158-161). The District Court specifically stated that (161):

> [w]here, as here, the government has indeed demonstrated that a formal administrative proceeding, in which the employee was found to have engaged in conduct unprotected by the First Amendment, preceded the disciplinary action complained of, a plaintiff may not avoid summary judgment merely by baldly asserting that his protected speech was the real motivation for the disciplinary action. Rather, he must provide some evidence showing that

> the purported reason for the disciplinary action is pretextual, or that the protected speech was the true motivation for the disciplinary action. Since plaintiffs have failed to provide such evidence, there is no basis upon which a reasonable jury could conclude that plaintiffs were disciplined for their exercise of free speech. Thus, summary judgment must be granted.

In July 1994, a timely notice of appeal to the United States Court of Appeals for the Second Circuit was filed (9), wherein petitioners challenged, inter alia, the District Court's determination that it was precluded from reconsidering their constitutional claims.

Meanwhile, by December 1993, petitioners had timely commenced a proceeding in State Court, pursuant to New York Civil Practice Law and Rules ("CPLR") Article 78, challenging the administrative determinations of guilt and penalties imposed, on the grounds, inter alia, that their First Amendment rights of free speech and Equal Protection had been violated. By order entered on March 24, 1994, pursuant to CPLR § 7804(g), the matter was transferred to the New York State Supreme Court, Appellate Division, First Department.

By decision and order (one paper) entered May 9, 1995, that Court unanimously confirmed the findings of guilt and penalties imposed by the Police Commissioner, and specifically found that petitioners' obstruction of traffic on the Bridge, while off-duty, did not implicate any First Amendment right to participate in a political demonstration. The Appellate Division further rejected all other claims raised

by petitioners. A copy of the Appellate Division, First Department's May 1995 decision and order is annexed hereto at AA-1. On September 7, 1995, the New York State Court of Appeals, this State's highest appellate tribunal, denied petitioners' motion for leave to appeal, a copy of which is annexed hereto as AA-2.

By order filed September 22, 1995, the United States Court of Appeals for the Second Circuit unanimously affirmed the District Court's order granting summary judgment to respondents and, applying principles of res judicata, the Second Circuit dismissed all claims against respondents. In reaching its determination, the Circuit Court stated that (A-6a):

> [i]n her Report and Recommendation, Koshetz [the hearing officer] rejected the plaintiffs' contention that the NYPD's charges were pretextual and violated their constitutional rights. The Appellate Division confirmed this determination in the Article 78 proceeding. On appeal, the plaintiffs again argue that the defendants retaliated against them and thereby infringed their rights under the First and Fourteenth Amendments. Since these claims arise out of the same 'factual grouping' as the claims put forward in state court, res judicata bars their assertion of these allegations before this court.

REASONS FOR DENYING THE WRIT OF CERTIORARI

POINT I

WHERE PETITIONERS' FIRST AND FOURTEENTH AMENDMENT CLAIMS WERE ORIGINALLY RAISED, LITIGATED, AND DECIDED IN AN ADMINISTRATIVE PROCEEDING, FOLLOWED BY REVIEW IN THE STATE COURT SYSTEM, WHICH AFFIRMED THE ADMINISTRATIVE DETERMINATION, PRINCIPLES OF COLLATERAL ESTOPPEL AND RES JUDICATA PRECLUDE ANY FURTHER CONSIDERATION OF THESE CLAIMS BY THE FEDERAL COURTS.

As both the District Court and the Second Circuit properly found, there is no reason for a federal court, including this Court, to consider petitioners' First and Fourteenth Amendment constitutional claims where, as here, those same claims were fully litigated and decided in the State Court system, beginning with a determination by a quasi-judicial administrative agency, followed by a determination by an intermediate state appellate court, and finally by an order of New York State's highest tribunal denying petitioners' application for leave to appeal.

In Ryan v. New York Telephone Co., 62 NY2d 494, 499-501 (1984), the New York State Court of Appeals held that the doctrines of res judicata and collateral estoppel are applicable to give conclusive effect to the quasi-judicial

determinations of administrative agencies, provided that the issue to be decided in the second action was raised and material to the determination in the administrative proceeding. The Second Circuit has also recognized that, as long as the individual against whom the doctrine of collateral estoppel is asserted had the incentive and opportunity to participate in the administrative proceeding, and the issue raised in the subsequent action is the same, then any further consideration of that issue in the subsequent action is precluded. See, e.g., Fondel v. Grumman Aerospace Corp., 884 F2d 657, 659 (2d Cir., 1989).

Applying these criteria to the case at bar, there can be no doubt that the constitutional claims raised in petitioners' Federal Court case were identical to those raised in the NYPD administrative proceeding, and that said claims were fully addressed and resolved therein. Thus, the Record demonstrates that, in their Federal Court complaint, petitioners contested the very same Charges regarding their conduct on September 16, 1992, upon the very same constitutional grounds, as were raised and adjudicated by the hearing officer in the prior administrative proceeding (13-26, 6-104). Indeed, the First Amendment issue was raised, briefed by both sides, and ruled upon by the hearing officer in an extensive and thoughtful 45-page Report and Recommendation to the Police Commissioner (60-104). The hearing officer's recommendation became a final determination when the Police Commissioner endorsed her findings and penalty recommendations (50).

In addition, the Record unambiguously establishes that the hearing officer explicitly held that petitioners' conduct in blocking traffic on the Bridge's roadway and ramp was a violation of local traffic laws, as well as a violation of police

regulations; therefore, such conduct simply did not rise to the level of speech protected by the First Amendment (96-98). Moreover, it was only those off-duty officers who were found guilty of having blocked traffic on the Bridge or ramp leading thereto who were disciplined, i.e., those who had broken away from the lawful demonstration, and who had engaged in unlawful activity. On the other hand, the thousands of other off-duty officers who had participated in the lawful demonstration, i.e., marching around City Hall Park and listening to speeches on Murray Street, were not brought up on Charges. Even those officers who had spilled out into the street beyond the police barriers had the Charges against them dismissed, because the hearing officer properly recognized that their presence in the street was an appropriate accommodation, by the on-duty officers, to the unanticipated numbers of demonstrators who had shown up to participate in the lawfully-sanctioned rally (92-93).

The Record further establishes that petitioners had a full and fair opportunity to litigate their constitutional claims before the hearing officer and did so. Petitioners were represented by counsel during the administrative trial which spanned four days and filled more than 700 pages of stenographic transcript (48, 60-104); and they had every opportunity to testify, call witnesses and present evidence, which they did, as well as to cross-examine the NYPD's witnesses and to examine its evidence, which they also did (48, 60-104).

Accordingly, because: (i) petitioners had a full and fair opportunity to litigate their constitutional claims during the administrative trial; (ii) they actually did so; and (iii) those claims were considered and rejected, the District Court and

the Second Circuit properly found that petitioners were precluded from relitigating those claims in a federal forum.

Finally, as the Second Circuit correctly found (see A-6a), once there was a final determination on these very issues by the State Court system, the Federal Courts were precluded from reconsidering the matter, pursuant to the doctrine of res judicata. Thus, the Second Circuit, citing Migra v. Warren City School District Board of Education, 465 US 75, 81 (1984), reiterated the well-established principle that Federal Courts must give a State Court judgment the same preclusive effect as would a court in the State where the judgment was rendered. Since the courts in New York have adopted a transactional approach to the application of the doctrine of res judicata, (see, e.g., Davidson v. Capuano, 792 F.2d 275, 278 [1986]; Gramatan Home Investors Corp. v. Lopez, 46 NY2d 481, 485 [1979]) the Second Circuit properly it found that res judicata barred any further consideration of petitioners' constitutional claims, because they had already been considered and rejected by the New York State Supreme Court, Appellate Division, and because the New York State Court of Appeals had declined to review the matter. See also, Smith v. Russell Sage College, 54 NY2d 185, 192-193 (1981).

Accordingly, the writ should be denied on the grounds that the Court is precluded from reconsidering petitioners' claims pursuant to the doctrines of collateral estoppel and res judicata.

POINT II

EVEN IF THE DOCTRINES OF COLLATERAL ESTOPPEL AND RES JUDICATA ARE INAPPLICABLE TO THE INSTANT CASE, NEVERTHELESS, THIS COURT SHOULD STILL DENY THE WRIT, BECAUSE THE NYPD'S FINDINGS OF GUILT AND IMPOSITION OF PENALTIES UPON THESE PETITIONERS DID NOT IMPLICATE THEIR FIRST AND FOURTEENTH AMENDMENT RIGHTS.

The law is well-settled that in order to make out a prima facie case that the government has violated the First Amendment right of one of its employees to speak out on a matter of public concern, the employee has the burden of establishing first that his/her speech can be "fairly characterized as constituting speech on a matter of public concern," and second, "that that speech was at least a 'substantial' or 'motivating' factor in the discharge". See, Frank v. Relin, 1 F3d 1317, 1328 (2d Cir., 1993), cert. denied, 114 S. Ct. 604 (1993), quoting, Connick v. Myers, 461 US 138, 146 (1983); Mt. Healthy City School District Board of Education v. Doyle, 429 US 274, 287 (1977). Moreover, in Pickering v. Board of Education, 391 US 563 (1968), this Court held that where the government seeks to discharge an employee on account of that employee's speech, the Court must engage in a balancing test whereby the employee must first establish that his/her speech constituted speech on a matter of public concern, after which the burden shifts to the government to demonstrate that its need to promote the efficiency of the public services that it must

perform through its employees outweighed the employee's constitutionally protected right to speak on the matter. See also, Rankin v. McPherson, 483 US 378 (1987); Connick v. Myers, supra, 461 US at 146. In Connick, id. at 147-148, this Court specifically noted that, in determining the threshold issue of whether the employee's speech addresses a matter of public concern, the Court must look at the content, form, and context of the statement, as revealed by the Record as a whole. In short, the question of whether the speech is a matter of public concern, which is a question of law, may not be considered in a vacuum; rather, "the manner, time and place of the employee's expression are relevant, as is the context in which the dispute arose". Rankin v. McPherson, supra, 483 US at 388. See also, Connick v. Myers, supra, 461 US at 152-53; Frank v. Relin, supra, 1 F3d at 1328.

Looking at this Record as a whole, petitioners have failed to meet their burden of establishing that their conduct on the Bridge, or the ramp leading thereto, rose to the level of constitutionally-protected speech on a matter of public concern. While it is undisputed that the lawfully-authorized PBA-sponsored demonstration, which included speeches on Murray Street and in front of City Hall, as well as the march around City Hall Park, all met the threshold requirement for establishing the existence of speech and activity on a matter of public concern, the "taking of the Bridge" did not meet this threshold requirement, because the conduct was not only unauthorized by the PBA, the very organizers of the demonstration, but also, it was illegal. Indeed, none of these petitioner-officers testified at the administrative hearing that being on the Bridge was part of the lawful demonstration, and three of them testified that they had engaged in the illegal activity of obstructing traffic (83-84, 86-88). Moreover, the PBA delegate witnesses explicitly disavowed that such action

was planned or considered part of the lawful demonstration, and further stated that they had actually gone to the Bridge to tell the renegade officers to go instead to the demonstration on Murray Street (77-79, 81-84).

In Pickering, supra, 391 US at 575, this Court recognized that the First Amendment does not guarantee people an unfettered right to express their views at any time and in any manner whatsoever; rather, such activities "are subject to reasonable time, place, and manner restrictions to further significant government interests". Moreover, in Cox v. Louisiana, 379 US 536, 554 (1965), Justice Goldberg observed that the blocking of traffic on the streets and sidewalks is a clear example of constitutionally unprotected conduct. Accordingly, since the instant petitioners failed to establish, as a matter of law, that their activities on the Bridge, or the ramp leading thereto, constituted speech on a matter of public concern, there was and is no need to consider the second part of the Pickering balance test, and it was proper to grant respondents summary judgment.

Even if petitioners met the threshold requirement of demonstrating that their conduct on the Bridge on September 16, 1992 constituted speech on a matter of public concern, under this Court's decision in Waters v. Churchill, 511 US __ (1994), 114 S. Ct 1878, petitioners can still not establish that the disciplinary penalties imposed upon them constituted retaliation for the exercise of their First Amendment right to speak on a matter of public concern. In Waters, supra, 114 S. Ct. at 1887-1889, this Court held, inter alia, that: (i) the government has far broader powers to restrict speech when it acts as an employer than when it acts as a sovereign; (ii) it is permissible to treat a government employee's speech differently from that of a private person, with respect to

substance and procedural requirements, due to the nature of the government's mission as an employer; and (iii) the government may discharge an employee for disruptive speech, based upon its reasonable belief as to what the employee said, regardless of what was actually said, provided that the government shows that the speech is "likely" to be disruptive. Moreover, in Jeffries v. Harleston, 52 F3d 9, 11 (2d Cir., 1995), cert. denied, 116 S. Ct. 173 (1995), the Second Circuit stated that it understood the Waters decision to mean that :

> a government employer [could] fire an employee for speaking on a matter of public concern if (1) the employer's prediction of disruption is reasonable; (2) the potential disruptiveness is enough to outweigh the value of the speech; and (3) the employer took action against the employee based on this disruption, and not in retaliation for the speech.

Accordingly, analyzing this case under the framework set forth in Jeffries and Waters, there can be no doubt that blocking traffic on a major artery leading into and out of Manhattan could reasonably be considered by the NYPD to be "disruptive" conduct where, as here, it was unauthorized and involved hundreds of people (69, 72, 80-81, 88, 90). In addition, where, as here, petitioners had the opportunity to express those very same views, on that very same day, and at that very same time, only a few blocks away at the lawfully-authorized demonstration on Murray Street, whatever possible value the speech on the Bridge might have had was far outweighed by the potential and actual disruptiveness of that conduct.

Finally, petitioners have pointed to no evidence in this Record, other than their bald, unsubstantiated assertion, that the disciplinary penalties imposed by the NYPD were a pretext for its alleged motive to retaliate against these off-duty officers for having spoken out on a politically sensitive issue. Indeed, after noting that petitioners had claimed, inter alia, that the Charges were merely a pretext for the NYPD's true motivation to retaliate, the hearing officer rejected this argument, along with all other claims of constitutional violations (95, 96). Moreover, the Second Circuit took pains to note that not only had this argument been rejected in the administrative proceeding, but also that the determination had been confirmed in the State Court Article 78 proceeding (see, A-6a).

Under any analysis, therefore, petitioners cannot demonstrate that the discipline imposed on them by the NYPD, for their conduct on September 16, 1992, was a violation of their constitutional rights, or that it was motivated by a desire to retaliate against them for their expression of views on a matter of public concern.

CONCLUSION

FOR ALL THE FOREGOING REASONS, THE PETITION FOR A WIT OF CERTIORARI SHOULD BE DENIED.

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larly since the expert had not met petitioner or observed his home life with the children *(see, Matter of Rebecca B.,* 204 AD2d 57, *lv denied* 84 NY2d 808).

There was no showing of prejudice in deciding custody pursuant to the writ, and moreover, respondent never moved to dismiss the writ. Finally, we find the visitation schedule was not restrictive. Concur—Murphy, P. J., Ellerin, Rubin, Tom and Mazzarelli, JJ.

14 In the Matter of THOMAS R. SHEEHAN et al., Petitioners, v RAYMOND KELLY, as Police Commissioner of the City of New York, et al., Respondents. [626 NYS2d 129] —Determination of the respondent Police Commissioner dated August 2, 1993, finding petitioners guilty of conduct unbecoming of police officers, and penalizing them 10 vacation days, is unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of the Supreme Court, New York County [Lewis Friedman, J.], entered February 24, 1994), dismissed, without costs.

Substantial evidence supports respondent's finding that petitioners obstructed traffic on the Brooklyn Bridge while off-duty and participating in a Patrolmen's Benevolent Association demonstration *(300 Gramatan Ave. Assocs. v State Div. of Human Rights,* 45 NY2d 176). The determination that such acts constituted misconduct was based on petitioners' violation of New York City Department of Transportation Traffic Rules and Regulations (34 RCNY) § 4-12 (o) (1) and § 4-07 (i), which prohibit the use of certain roadways, including the Brooklyn Bridge, by pedestrians unless signs permit such use, not their participation in a political demonstration, and thus did not implicate petitioners' First Amendment rights *(see, Cox v New Hampshire,* 312 US 569). We have considered petitioners' other arguments and find them to be without merit. Concur—Murphy, P. J., Ellerin, Rubin, Tom and Mazzarelli, JJ.

15 In the Matter of SCORES ENTERTAINMENT, INC., Petitioner, v LIQUOR AUTHORITY OF THE STATE OF NEW YORK, Respondent. [626 NYS2d 441] —Petition, transferred to this Court by order of the Supreme Court, New York County (Joan Lobis, J.), entered on August 4, 1994, to review the determination of respondent, granted for the reasons stated by Lowe, J. in *Jay-Jay Cabaret v State of New York,* (Sup Ct, NY County, Apr. 7, 1994, *affd* 215 AD2d 172 [decided herewith]) and the determination annulled, without costs and without disbursements. No

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511 Equities Corp., Matter of, v Town of E. Hampton ... (2d Dept: — AD2d —) ... denied
Fricker v New York City Off Track Betting Corp. ... (2d Dept: 213 AD2d —) ... denied
Giendoro v Cohen ... (2d Dept: — AD2d —) ... denied
Groger v Morrison-Knudsen Co. ... (2d Dept: 184 AD2d 620) ... denied
Guddemi, Matter of, v Rozzi ... (2d Dept: 210 AD2d 479) ... denied
Horizon Ins. Co., Matter of (Walsh v Doody) ... (1st Dept: — AD2d —) ... denied
Joel P., Matter of, v Bane ... (1st Dept: — AD2d —) ... granted
Lee TT., Matter of, v Dowling ... (3d Dept: 211 AD2d 46) ... granted
Loeffel, Matter of, v Kelly ... (1st Dept: — AD2d —) ... denied
Lorenz v Division of Taxation of Dept. of Taxation & Fin. of State of N. Y. ... (4th Dept: — AD2d —) ... granted
Marx v Akers ... (2d Dept: — AD2d —) ... granted
Miracle Pub, Inc., Matter of, v New York State Liq. Auth. ... (2d Dept: 210 AD2d 229) ... denied
Morgan v Garrido ... (2d Dept: 213 AD2d —) ... denied
New York City Dept. of Sanitation v MacDonald ... (1st Dept: — AD2d —) ... granted
Petrillo v Trevus Constr. Corp. ... (2d Dept: 208 AD2d 512) ... denied
Police v Clinton Cent. School Dist. ... (4th Dept: — AD2d —) ... denied
Rivas v Parnes ... (1st Dept: — AD2d —) ... denied
Shahzaman v Green Bus Lines Co. ... (2d Dept: — AD2d —) ... denied
Sheehan, Matter of, v Kelly ... (1st Dept: — AD2d —) ... denied
Thomas v City of New York ... (2d Dept: — AD2d —) ... denied

Decided September 12, 1995

Boston, Matter of, v Medical Servs. for Women ... (3d Dept: — AD2d —) ... denied
Brown, Matter of, v Rotker ... (2d Dept: — AD2d —) ... denied
Cassandra C., Matter of (Charles C.—Robert A.) ... (2d Dept: — AD2d —) ... denied
Donald Q., Matter of (Nancy Q.) ... (3d Dept: — AD2d —) ... denied
Elizabeth Q., Matter of (Nancy Q.) ... (3d Dept: — AD2d —) ... denied
Flushing Natl. Bank v State of New York ... (2d Dept: 210 AD2d 294) ... denied
Gago, Matter of, v Acevedo ... (2d Dept: — AD2d —) ... denied
Guarneri v Korea News, Inc. ... (2d Dept: — AD2d —) ... denied
J. S., Matter of (A. S.) ... (1st Dept: — AD2d —) ... denied
Michael N., Matter of ... (3d Dept: — AD2d —) ... denied
Nassau, County of, Matter of, v New York State Pub. Empl. Relations Bd. ... (2d Dept: — AD2d —) ... denied
Olsen v We'll Manage, Inc. ... (2d Dept: — AD2d —) ... denied
Orofino v Orofino ... (3d Dept: — AD2d —) ... denied
Parcel 242 Realty, Matter of, v New York State Div. of Hous. & Community Renewal ... (1st Dept: — AD2d —) ... denied
Rakowski, Matter of, v New York State & Local Retirement Sys. ... (3d Dept: — AD2d —) ... denied
Reis v New York Hosp.-Cornell Med. Ctr. ... (1st Dept: — AD2d —) ... denied
Roy D., Matter of (Elizabeth T.) ... (4th Dept: 213 AD2d —) ... denied

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